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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 389.

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

THE AMERICAN CRAYON COMPANY.

MEMORANDUM IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI.

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The American Crayon Company ("American Crayon") hereby waives its right to file a brief in opposition to the petition for a writ of certiorari filed by the Solicitor General on behalf of the Federal Trade Commission.

American Crayon offers to join in the suggestion of the Solicitor General (p. 14 of his petition) that the Court may deem it appropriate to grant certiorari, and reverse, without further briefs or oral argument, the portion of the judgment of the Court below which struck paragraphs 1, 2 and 3 of the Commission's order, and remand the case for further proceedings.

American Crayon has also filed a petition for a writ of certiorari in this case (which in effect is a petition for a cross-writ). That petition seeks a review of the remainder of the judgment of the Court of Appeals; namely, that part of the order which the Court of Appeals affirmed and enforced.

Both petitions present the same question: Whether, in a proceeding for enforcement of a Commission cease and desist order under 15 U. S. C. 21, under which the Court of Appeals is empowered to affirm or set aside such order, the determination of the court to affirm a part, or to set aside a part, of the order depends solely on whether such part of the order has or has not been violated since issuance.

The complaint of the Solicitor General is that the lower court *set aside* a part of the Commission order, without passing on the question of its validity, solely because there was no showing of a violation of that part.

The complaint of American Crayon is that the lower court *affirmed* a part of the Commission order, without passing on the question of its validity, solely because there was a showing of violation of that part.

The Solicitor General's petition correctly[1] points out that affirmance of a Commission order depends solely on proof of validity, not on proof of violation. This contention applies with equal force to both parts of the order. The Court of Appeals indicates by its judgment that it did not hold either that the 2(a) part of the order was invalid or that the 2(d) part of the order was valid. If the judgment is to be reversed, it should be reversed in its entirety, for the reasons stated in the Solicitor General's brief as

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[1] American Crayon does not acquiesce, however, in all of the statements and contentions in the petition. In particular, it excepts to the statement (p. 13) that the Section 2(a) part of the order is unquestionably valid. The Commission itself in another proceeding (*In the Matter of National Biscuit Co.*, CCH Trade Regulation Reporter, Tenth Edition, Vol. 3, par. 25,066) rewrote a similar order on the plea of Commission counsel that it was "ambiguous" and "enigmatical" and that an enforcement decree based upon it would "raise still more questions of interpretation."

supplemented by the grounds set forth in the petition for a cross-writ of certiorari filed by American Crayon.

October, 1955.

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